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No. 2941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE QUICKSILVER MINING COMPANY
(a corporation),
Defendant and Plaintiff in Error,

vs.

C. P. ANDERSON,
Plaintiff and Defendant in Error.

REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

A. H. JARMAN,
Attorney for Plaintiff in Error.

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We will answer the brief of defendant in error in the order in which it is made, indicating where necessary the pages to which our reply is directed.

We believe that defendant in error stated away his case under the heading "The Cause" (p. 4).

Nones was the president of a great mining corporation, capitalized at $10,000,000, with a production record of upwards of $150,000,000. The Mining Company has been actively engaged in mining since 1866—the mine itself has been operated for upwards of 100 years. The Mining Company operated this vast mining property for more than forty

years under the direction and management of such able engineers as Randol and Derby, yet it remained for Nones, who was not a mining engineer, to discover the alleged *"necessity"* for the development of the company's water power, the like necessity for acquiring adjoining lands so as to augment that which the Company already owned,—not because the Company needed the additional water or power that might be generated therefrom, for its business of mining—but simply that it might sell same for a profit; it remained for Nones to discover the alleged "necessity" for an electric "railroad" from San Jose to New Almaden, although the Southern Pacific Company had a branch line within two miles of the mine, and has for years operated and now operates its trains for the accommodation of the Mining Company.

The question of "necessity" was and is a fiction of Nones' imagination, and was brushed aside by the learned trial judge as unworthy of serious consideration (Tr., pp. 118-119).

Had Nones undertaken the construction of an electric railroad to connect up the company's property with the Southern Pacific line, there might be some plausibility to the contention of the defendant in error that such an enterprise was "necessary" as an incidental power in the successful operation of its mine—but no such idea actuated him, and the services performed by Anderson were not so intended or so limited. Simply because an electric railroad carrying passengers, freight and mail

might prove of convenience to the Mining Company in its business will not legitimatize such an enterprise and include it as an incidental power necessarily granted by its charter.

Accepting defendant's in error statement as to the "Cause", we submit that such statements as:

> "Nones * * * recognized * * * great commercial value * * * water rights * * * power purposes * * * irrigating * * * orchard lands of Santa Clara County * * * he concluded * * * electric railroad * * * a necessity * * * I * * * believe it * * * a necessity",

do not constitute proof that either or both enterprises were in fact a necessity or necessary to the Mining Company in its business. Testimony to this effect is merely evidence of Nones' opinion and has no legal or probative value. It was and is the prerogative of the Mining Company to determine this necessity.

Whether an incidental power is necessary is a question for the corporation and not for its agents. The opinions or declarations of agents are not competent to establish the necessity for the exercise of such powers. Nones was not qualified to express an opinion on such a subject, nor did he pretend to be. The burden of proof rested on defendant in error—he having failed to establish a proper determination by the corporation itself, for the exercise of these concededly implied powers—this case stands without proof that either the railroad or power projects were necessary or incidental to the

powers granted to the Mining Company by its charter.

On pages 4 and 5 counsel says:

> "In April, 1910, * * * Nones * * * explained what was wanted * * * in securing * * * control of water rights and power rights * * * Mr. Anderson accepted the offer made him and entered upon this undertaking about April, 1910."

At this time, Anderson made no inquiry as to Nones' authority to employ him for a purpose obviously different from the Mining Company's usual and ordinary business. He went ahead without knowledge of any kind, save and except the bare fact that Nones was president of the Mining Company. There is no pretense on the part of Anderson that at this time, April, 1910, he was warranted in dealing with Nones in the belief that he had authority to bind the Mining Company, as there is no evidence of express authority and there is no evidence that the Mining Company had at this time ever done anything or suffered anything to be done by Nones—from which Anderson or any other person would be warranted in believing that he possessed authority to engage in such enterprises.

In our opening brief we submitted authorities, not controverted by the defendant in error, to the effect that a president of a corporation has no power merely because he is president to bind the corporation by contract; that he possesses only such powers as has been given him by the by-laws and the board of directors and

> *"such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation."*
>
> Black v. Harrison Home Co., 155. Cal. 121.

There is no evidence of any power conferred upon Nones by the by-laws or by the board of directors. There is no evidence of power arising constructively from anything assumed or done by Nones in the *past,* as there is not a word of testimony in the record of any fact or event prior to Anderson's employment, other than the bare fact of Nones' election as president in June, 1909. This being so, it is idle to discuss the remaining essentials—*apparent consent and acquiescence* by the corporation.

So as to the services performed for the proposed electric railroad—there is no evidence of *prior* facts from which Nones' authority could be inferred, there is no evidence of anything done or of authority assumed from which an implied authority might be predicated.

The only testimony in this regard is that of Anderson, himself, as to the alleged declarations by Nones. In our opening brief (p. 79) we quoted the rulings of the learned trial judge that agency cannot be proved by the declarations of the agent.

Summarized, the most that can be made out of the case for the defendant in error is, that without knowledge or inquiry as to Nones' authority, An-

derson entered upon the performance of the duties alleged in his complaint, to-wit:

> *"To do certain work and labor and to perform certain services in the matter of organizing two certain corporations, which said corporations are denominated and known as the San Jose and New Almaden Railroad Company and the Senonac Power Company. That said employment covered the organization of said corporations by plaintiff, the assistance of plaintiff in carrying on the business of said corporations, the services of plaintiff in securing options for the purchase of property and rights of way for a railroad, and the purchase of property and options, for the purchase of property and water rights and rights of way for said power company, and doing and performing of such other matters and things as might from time to time be required by said defendant in connection with the purposes for which said corporations were to be and were organized."* (Tr. pp. 1 and 2.)

Having thus dealt with Nones, he did so at his peril.

Fontana v. Pacific Can Co., 129 Cal. 51.

WITNESSES.

(pp. 7-10.)

Counsel for defendant in error has gone somewhat outside of the record. The depositions of the witnesses, taken in New York, were introduced in evidence by defendant in error as a part of *his* case, *before* any other testimony had been introduced or offered in his behalf (Tr., p. 53).

We know nothing of Mr. Marshall or Mr. Blandy, except that as lawyers they appeared for and represented defendant in error in the taking of the depositions. Otherwise the record is silent as to them.

It is dogmatically asserted that there is a marked conflict found in the testimony given by Nones himself, and had Nones testified with truth and frankness—yet no attempt is made by learned counsel to point out that conflict, or to specify the testimony which in any way indicates a lack of truth and frankness.

It is stated that Nones was an unfriendly witness to defendant in error, yet no fact or circumstance is noted to substantiate this claim.

Dogmatic assertion is not argument, and proves nothing.

If Nones was unfriendly to any of the parties he was and is unfriendly to the Mining Company. The fact that he was ousted as its president, that he was under fire by its stockholders, and that he received a great deal of unpleasant notoriety when he was dismissed by the Mining Company, if anything, tended to make him unfriendly to plaintiff in error.

When he gave his testimony he was not a stockholder, nor in any way interested in the Mining Company. There was then no reason why Nones should in the slightest degree favor the Mining Company by his testimony.

Nones testified truthfully. There is no indication of false testimony in a single particular. His testimony is corroborated by documentary evidence and by the witnesses.

Whatever our opinion may be of Nones' business or executive ability as the head of a great mining corporation, we respect him for observing his oath and testifying truthfully when compelled to do so.

If there was and is a conflict in Nones' testimony, sufficient to discredit him as a witness for the defendant in error, and to render his testimony worthless and unworthy of belief, such conflict should have been pointed out in the reply brief and not left for this court to discover in a three-hundred-page record.

On page 9, counsel says:

> "Counsel in his brief takes up the remarks of the court, for the purpose of indicating the court's mind at the time of the trial."

Including this discussion in the record and in our brief was *not* for the purpose of indicating the court's mind at the time of trial on the merits of the case, nor to indicate any construction of the evidence at the time of the ruling. It was inserted because:

(1) It presents clearly and correctly the theory of the trial in the court below;

(2) Because the rulings on the objections made are fundamental and sound;

(3) Because we believed it would give this court a better idea of the case.

The soundness of the rulings and the legal principles necessarily included are not challenged by defendant in error—this being so, this court may safely accept them as the law of the case.

The only conflict in the testimony is between Anderson and Nones.

Anderson testified to alleged declarations by Nones. Nones denied making any such. What does this conflict amount to? An assertion and denial of incompetent evidence. Even if Anderson's testimony be conceded, yet it would not be legally sufficient to prove the authority of Nones to bind the Mining Company. There was, therefore, no conflict of material evidence which the lower court was called upon to determine.

As stated in our opening brief, the real question for determination is whether the Mining Company impliedly authorized or conferred authority on Nones to undertake in its behalf the railroad and water enterprises. In that the declarations of the alleged agent are not sufficient to prove it—we must look to *"other evidence"* in the record to prove the agency.

In our opening brief we stated that there was no evidence of express authority conferred on Nones to engage in these enterprises. Learned counsel for defendant in error contends other-

wise—yet he fails to direct attention to the evidence supporting his contention.

If the Mining Company is liable to defendant in error for the services performed by him, it is because it impliedly conferred authority on Nones to engage his services for the matters in which same were rendered.

In our opening brief we stated the law applicable to this case. We again repeat:

> *"It is an elementary principle of corporation law that a president of a corporation has no power merely because he is president to bind the corporation by contract. * * * The president has only such power as has been given him by the by-laws and by the board or directors, and such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation."*
>
> Black v. Harrison Home Co., 155 Cal. 121.

There is no evidence in the record and the learned counsel for defendant in error has not directed our attention to any evidence from which the trial court could find an implied authority because of assumption or exercise of power in the past with the apparent consent and acquiescence of the corporation.

Apparent consent and acquiescence implies that the directors must have had knowledge of such assumed powers.

AUTHORIZATION, EXPRESS OR IMPLIED.

(pp. 10-12.)

Under this heading counsel states that Nones and Tatham had complete charge of the business of the Mining Company in the State of California, and that no business involving the properties of the Company could be transacted, so far as the public was concerned, other than with Nones and Tatham. Quite true,—that is what they were elected to do;—*to transact the company's usual and regular business.* They had full authority to represent and bind the Mining Company in all usual and ordinary matters in the routine of its regular business. They had complete charge of its mining property and of its mining oprations, and no transactions respecting the Company's usual and ordinary business, whether transacted by Nones and Tatham or by their successors, has ever been questioned or disputed.

What difference did it make that defendant in error did not know the members of the board of directors of the Mining Company. He had to know at his peril that the Company's representatives had the requisite authority to engage in the matter in which he was interested. A two-cent stamp would have gained the information in a reasonable time—a telegram would have advised him in a few hours.

It is the unusual, extraordinary, unexpected, unanticipated business, entirely different from and outside of the scope of its usual and ordinary

business in which it has engaged, for more than forty years, that we complain of. By no stretch of the imagination can the construction of an electric railroad or the acquiring and development of great water rights be deemed the usual and ordinary business of a mining company.

On page 11 counsel quotes from the opinion of the learned trial judge, to wit:

> "There is no doubt but that plaintiff was employed by Nones, the apparent supreme directive head of the destinies of the corporation, to perform certain services for and in behalf of the corporation * * * that such employment was had with the knowledge of Tatham, etc."

The vice of the decision of the court below is found in this brief paragraph. So far as the record in this case is concerned, it is not questioned but that Nones was the supreme directive head of the Mining Company. *Only, however, as to its regular and usual business.* That Tatham knew anything about it is of no consequence. True, he was a director, but he never attended any meeting while he held office. There is not even the pretense that a *majority* of the board of directors had knowledge of these matters.

Necessarily, there must be some limitation upon the powers of the officers and managers of corporations which conduct business operations at some distance from the Company's principal office and

place of business. If this is not possible, then all foreign corporations engaged in business in other states will be at the mercy of their representatives. Merely because the board of directors of a corporation elect a president to take charge of and operate and conduct its business, and a general manager to assist, is the corporation to be bound by *every wilful or fanciful engagement* which its representatives might choose to engage in, merely because *they* believe that it might be of some benefit to the corporation? If the corporation is to be bound merely because its representatives have attempted to engage in such matters, without the knowledge or acquiescence of the Company, then there will be a contraction of business enterprises and a great hardship upon new and undeveloped countries.

Such a rule, of course, is impossible. The law is clear and concise. A corporation is *only* responsible for the acts of its officers and agents within the scope of their authority, either express or implied. If there is express authority or if the corporation has impliedly held out its agent as possessing the requisite authority, and has knowingly acquiesced or participated in the results, then of course it is liable.

If it has not done so, then under no principle of law can it be held liable for the unauthorized acts of its agents.

NONES.

(pp. 12-17.)

Under this heading counsel states that Nones was in effect the entire board of directors. This is mere argument and finds no support in the evidence.

While we have only included in the record on this appeal a very small portion of the minutes of the Mining Company (Tr. pp. 231-260), it is apparent that the Mining Company had a board of directors that met and acted upon a great many matters, and that it actively participated and governed and regulated its affairs.

At the bottom of page 13 a portion of Miss Bowes' testimony is quoted, to wit:

> "I cannot remember any disapproval of any of his executive acts as president."

The first question on redirect examination, she answered:

> "Controversies often came up; I cannot remember just what was approved or disapproved, something that comes up is not always approved."

Turning to the minutes of the board of directors of September 20, 1911, in which is included a written report by Nones recommending and inviting the board to the serious consideration of the proposed electric railroad, we find the resolution of the board requesting full information *before taking action.*

There is no evidence in the record of complete control or domination of the board of directors

by Nones. Naturally, any board looks to its president and usually follows his suggestions. In this case Nones was actively engaged in looking after the affairs of the Mining Company. He visited its property and was actively engaged in its affairs. We know of no reason why a board of directors should not look to its president for guidance and information concerning the Company's affairs.

This Mining Company had continuously for more than forty years operated its mining property at New Almaden in exactly the same manner as during the Nones administration, and it is today pursuing the same method. Its president and general manager have full and complete charge of all its mining activities.

Whatever participation Tatham had in these enterprises is not binding on the Mining Company for there is no pretense that he was authorized, expressly or impliedly, to engage in these matters for and in behalf of the Company. That Tatham was a useful and pliable treasurer, and that he, as such, wasted and squandered the Company's funds, without the knowledge or consent of the Company or its board of directors, is no reason why the Company should be bound to pay for Anderson's alleged services. Two wrongs never did make a right, and Tatham's participation only makes the matter worse, instead of improving it.

Comment is made on page 16 of the indifference of the board of directors with regard to their regular meetings, in that several months at a

time elapsed without a meeting of the board of directors. Though this be true, it has no relevancy in this case, for Anderson's services were not rendered, nor was he injured in any way on account of this alleged failure to hold regular meetings. Had he endeavored to ascertain from the board whether Nones had authority to engage his services, and by reason of its failure to meet and respond to his request, then the company might be held responsible for its neglect to meet and advise Anderson of the facts. But such is not claimed; therefore the meetings of the board of directors are entirely immaterial and of no consequence in this case.

When a company has a well established going business, running smoothly, there is little or no necessity for a meeting of its board of directors, as those in charge have full authority to handle all its usual and ordinary business.

There is nothing in the record in this cause which in the slightest degree indicates that there was any necessity for a meeting of the board of directors during the period complained of, nor is there any evidence that the failure to hold the meetings during this period in any way affected defendant in error. As a matter of fact, he never knew anything about the minutes of the Mining Company until its minute book was returned to the lower court as an exhibit attached to the depositions which were taken in New York.

On page 17 counsel states that the sum of $9176 was charged in one year to the New York office in a lump sum. This is true, and because the stockholders believed in its officers and accepted their reports as rendered and did not discover the deception of Nones and Tatham, is the Company to be bound in all other matters and things which they have engaged in without right or authority?

The weakness of this argument is that as soon as the stockholders learned of the items constituting the lump sums charged to the New York office, and as soon as they had investigated and learned of this proposed railroad and the power enterprise, they called a special meeting of stockholders. After all manner of delays, etc. (without fault of the stockholders), a meeting was finally held on February 15, 1913, at which the stockholders authorized an examination of its books by certified accountants, and an examination of its mining properties by a competent mining engineer,—the result of these reports being that at the annual meeting of stockholders in June, 1913, Nones and Tatham were deposed and a new board of directors installed and a new president and general manager elected.

If the court will take the time to read the stenographic copy of the minutes of the meeting of the stockholders of February 15, 1913, it will be convinced beyond question that the stockholders of the Mining Company did not acquiesce in these unauthorized dealings of its president after having gained knowledge of the facts.

Nones frankly testified that he held on to his job as president of the Company for several months, and that he was under fire and that his acts were questioned.

The strangest part of the argument under this heading, to our mind, is that all the facts discussed were events and circumstances happening *after* Anderson had entered upon and had in fact completed a great part of the services for which he has recovered judgment. How can he be permitted to rely upon *subsequent* acts as justifying his reliance or belief that Nones had authority to engage his services in these enterprises for and in behalf of the Mining Company?

The fallacy is obvious. What he must prove is acts or conduct relating to *past* transactions on which he relied or which would justify his assumption that Nones possessed the requisite authority to engage his services on behalf of the Mining Company. To justify express or implied authority, the evidence must relate to *past or prior or even contemporaneous* transactions.

If an agent's authority is to be justified by evidence of subsequent transactions, that evidence must be of a ratification, and not of independent acts or proceedings from which *authority* might or might not be inferred.

THE POWER COMPANY.

(pp. 17-23.)

Counsel says that this power project "was determined by the president to be a necessity". The fallacy of this argument lies in the fact that the president of a corporation has no power to determine whether such an enterprise is or is not a necessity. This determination belongs to and rests solely with the corporation itself.

Anderson testified that the deed executed by the Quicksilver Mining Company to the Senonac Power Company was for *rights of way for power* and *not for the Company's water rights* (Tr. p. 62).

On page 19 reference is made to the California Power Company and the resolution of the board of directors of September 20, 1911, concerning the transfer to this company of its water rights, etc.

There is no evidence that Anderson knew anything about this Company, or that he relied upon it in any particular, and even had he known anything about it, such fact would not justify him in believing that Nones possessed authority to buy additional lands and to organize another and different company.

On March 18, 1912, a resolution was passed by the board of directors of the Mining Company authorizing the transfer of its water rights to the Senonac Power Company. What has this to do with Anderson or his employment relating to other lands or other water rights? This resolution was

passed after his services in the power enterprise had been completed and there is not a scintilla of evidence in the record, directly or indirectly, from which it can be inferred that either the Mining Company or its board of directors had any knowledge that Anderson was employed in any capacity in relation to this matter, or that the Senonac Power Company or its promotors had obtained any options, or that they had made any investigations of other lands or of other water rights.

On page 22 it is stated:

> "When plaintiff in error took over the stock of the Senonac Power Company it received the benefits of all of the services and expenditures of Mr. Anderson."

There is no evidence that the Senonac Power Company ever took over anything which resulted from the services performed by Anderson. As a matter of fact Anderson himself testified that the options which he secured and which constituted the major portion of his services lapsed because Nones did not put up the moneys to complete the purchase price. There is no pretense of evidence in this case that any service or expenditure by Anderson benefited the Mining Company. On the contrary, it distinctly appears, and the fact is, that it was a detriment to the Company and an absolute squandering of its corporate funds. There is no evidence that the Mining Company accepted any benefit from these alleged services and expenditures with knowledge of the facts and circumstances.

Just as soon as the Mining Company had an opportunity to investigate the Senonac Power Company and the San Jose and New Almaden Railroad and as soon as it received full information of all of the facts, it immediately caused both corporations to be disincorporated. What else could it do—burial was the only thing.

THE RAILROAD COMPANY.

(pp. 23-40.)

The principal argument in support of Nones' alleged authority to engage in this enterprise are the statements of Nones, to wit:

> "That the Quicksilver Mining Company needed better transportation, that he contemplated building an electric line, that there would be no stock sold, and that the Quicksilver Mining Company would pay for the building of the road and would take all the stock and that Nones depended entirely upon Anderson to produce the rights of way and franchises, etc."

Legally, these are but the declarations of an alleged agent made without proof of authority, knowledge or consent of his principal. They have no value whatever as evidence and are not competent to prove Nones' authority to engage in the railroad enterprise.

On page 25 counsel says that it was known to the entire community that the railroad project was the project of the Quicksilver Mining Company,

as it had been announced to the community at the first meeting of citizens. This may be so, yet the knowledge which the community had was gained solely through the unauthorized declarations of the alleged agent. Nothing that was said or done by the Mining Company justified this belief in that community. If Anderson and the citizens along the line of the proposed railroad were content to accept Nones' statements as to his authority to engage in this enterprise without investigation or inquiry of any kind, they cannot now be heard to complain when it is known that he was acting without authority and entirely on his own initiative.

On page 26 counsel says that the proposed branch line to the "Senator shaft" was beneficial to none except the Mining Company. This statement is merely a supposition, as there is no evidence in the record that this proposed branch line would in the slightest degree benefit the Mining Company.

Outside of the record and as a matter of fact, no one but an insane man would build such a line. At the present time this Company is handling some four hundred or five hundred tons a day from the "Senator Shaft". Reduction works have been erected and the quicksilver is produced right at the shaft. Ordinary common sense teaches the wisdom of this method, and it does not take a mining engineer to demonstrate the absurdity of hauling four or five hundred tons per day to another furnace several miles away. It is a matter of common knowledge that the extraction from the

ores produced at this mine average one per cent or two per cent of quicksilver. Is it not easier and cheaper to haul one per cent or two per cent in weight than it is to haul one hundred per cent in weight, at least ninety-eight per cent of which is waste? The statement, therefore, that this alleged railroad would be beneficial to the Quicksilver Mining Company is an absurdity on its face.

Throughout the brief learned counsel has repeatedly referred to Mr. D. M. Burnett, and on page 26 attention is directed to the fact that he appears with the writer of this brief as one of the attorneys for the Mining Company in the present litigation.

Mr. Burnett is not and never has been the attorney for the Quicksilver Mining Company since the change of administration in 1913. Mr. Burnett is a gentleman of the highest type, a man whose integrity is unquestioned, and for many years has been and still is an intimate personal friend of the present counsel for the Mining Company. This litigation was first commenced in the Superior Court of the State of California in and for the County of Santa Clara. Counsel for the Mining Company had and still maintains his office in the City of San Francisco. Papers on removal from the state court to the federal court were prepared in San Francisco and sent to Mr. Burnett in San Jose to serve and file, with the request that he appear and present the motion, which was purely formal. This Mr. Burnett did, as a matter of friendship and as a courtesy to counsel, without

compensation. If Mr. Burnett's name and that of his partner appear as attorneys in this matter on the motion, it was an inadvertence and merely as a matter of compliment to Mr. Burnett. Mr. Burnett has taken no part in the trial of this case, and is not now the attorney for the Quicksilver Mining Company.

While all this is quite outside of the record and of no moment to this litigation, we deem this statement necessary that someone in reading the briefs might misconstrue the language used in connecting Mr. Burnett with the present litigation.

On page 27 it is stated that various sums of money were expended from time to time by the Mining Company for preliminary costs and expenses. It is quite true that Nones and Tatham disbursed the corporate funds of the Mining Company for alleged railroad purposes, but such expenditures were not known to the Mining Company or to its board of directors. No report of such expenditures was ever made to the board of directors by Nones and Tatham until the month of May, 1912, when Nones reported that $3000 had been expended upon a right of way, surveys and cutting down grades. There was nothing else for the board of directors to do but to approve this expenditure. This, however, was done after Anderson's services had been completed, and in approving the expenditures no reference or report was made to any services performed by Anderson. As a matter of fact, the

action of the board in approving the expenditure of this money was not known to Anderson until after this suit was begun.

On page 27 reference is made to the fact that money was sent from New York to Mr. Anderson. This money was sent by Nones and there is no proof in the record that it was sent by the Mining Company or by or with the authority of its board of directors, and there is no proof that the Mining Company or its board of directors had any knowledge of such fact.

On page 29 counsel states that the entries which Tatham made on the books of the Mining Company at New Almaden must have accompanied and been a part of the annual reports which were printed and forwarded to the individual stockholders in New York City. Such a statement is not true and is not substantiated by any evidence in the record. On the contrary it distinctly appears that Tatham's Company annual reports made no mention of any sums expended by the Mining Company for either the railroad or the water project, all such were included under the general heading of "Bills Receivable".

If the court will kindly read the minutes of the stockholders' meeting of February 15, 1913 (Tr. pp. 224-30), the method of Nones and Tatham in keeping the Company's accounts and the deception employed by them in rendering same to the board and to the stockholders will be seen.

On page 30 of the brief reference is made to the payment of various sums by Tatham as treasurer of the Mining Company, aggregating a considerable sum. If the court will note the times of the respective payments and will compare same with the resolution of May 1, 1912, approving the president's action in ordering the sum of approximately $3000 to be charged to *March Expenses,* it will be seen that Nones practiced a willful deception upon the board of directors. No such sum was ever charged to March expenses. The money had already been disbursed.

As stated in our opening brief, the fact that the board of directors on May 1, 1912, approved the unauthorized expenditures made by its president for this railroad project has no relevancy to this inquiry, as it was made after *Anderson's* services had been completed. Furthermore, he had no knowledge of such a resolution until after the commencement of this action. Consequently, this incident has no relevancy in this case.

The only time that the railroad enterprise was placed squarely before the board of directors was when Nones read a written report at the meeting of September 20, 1911. After hearing this report, which concluded as follows:

> *"This proposition is worthy of most serious consideration. I have devoted several months to it and have obtained the approval of the majority of the property owners whose lands are along the proposed line of the railway",*

the board of directors of the Mining Company adopted a resolution that *before taking action* on an electric railroad that the president furnish complete specifications showing costs, earnings, etc., and authorized Director O'Brien to engage an engineer to make such a report.

Considerable stress and reliance is laid upon Nones' report of December 31, 1911, in which it is stated that the Company had obtained the necessary rights of way and franchises for an electric line to be owned entirely by the Company. This statement, taken in connection with the president's report to the board of directors of September 20, 1911, and the action of the board in reference thereto, can only mean that the president had obtained the approval of the majority of the property owners whose lands lay along the line of the proposed railroad. Inasmuch as at this time the board of directors were awaiting the report of the engineer as to feasibility, costs, etc., before taking action, such a statement in Nones' report to the Company is not such as necessarily advised the Mining Company that its president had expended its funds, or that he had employed Anderson to obtain rights of way, or that he had employed Anderson to organize the San Jose and New Almaden Railroad Company.

The Mining Company upon Nones' recommendation authorized an expenditure of $8000 for a paint mill. The fact is that such a mill was never built and never will be built. The only evidence

the Company had as to the feasibility or advisability of such an enterprise was the statements of Nones. Subsequent investigation of this matter put this alleged enterprise in the same class with the railroad and power projects—rank nonsense and bunk.

On page 38 counsel again asserts:

> *"That an examination of his deposition* (Nones) *shows a very pronounced effort on his part to avoid the truth, thereby favoring the Quicksilver Mining Company."*

This statement is not backed by any particular quotation from the evidence or by any reference justifying such a conclusion.

Considerable stress is laid upon the fact that in Nones' schedules in bankruptcy he included defendant in error as his creditor for the sum of $4500, under the heading: "guaranty of payment for work done for Quicksilver Mining Company".

There is no inconsistency between this and the testimony of Nones, either on direct or cross-examination. Apparently Nones believed in these enterprises; he believed that the Mining Company would ratify and approve his acts when he placed them before the board; there is no question but that he believed that the board of directors would sanction and authorize the payment of $4500 which he had promised to pay to Anderson, else why should he obligate himself personally by an instrument in writing to pay Anderson the sum of $4500?

If we have not already said it, we take this occasion to say to this court that the bankruptcy pro-

ceedings introduced into this case show the why and wherefore of the present suit against the Mining Company. Does anyone imagine that if Nones was financially responsible and able to respond to Anderson for the sum of $4500 that any action would ever have been commenced against the Mining Company? It was only when Anderson learned that Nones was a bankrupt and his obligation discharged that he was compelled to turn to the Mining Company in order to be compensated for the services which he rendered Nones.

We have quoted Nones' testimony on pages 28 to 33 of our opening brief relating to this matter, and we invite the court's particular attention to this and all of his testimony for the particular purpose of ascertaining whether it shows any effort, however slight, on his part to avoid the truth.

On page 40 counsel quotes:

> "Q. You guaranteed him that $4500 for his services for the Quicksilver Mining Company? A. I did."

From this, counsel deduces that Nones was permitted by the directors and stockholders to exercise unlimited powers. This testimony of Nones is nothing more or less than a declaration or admission on his part that the alleged services were rendered for and in behalf of the Mining Company. It proves nothing, as a principal cannot be bound by the declarations or admissions of its agent.

On the same page counsel says that the conduct of the board of directors and the stockholders as

to each of the proposed enterprises would and did warrant the same conclusion. But what conduct of the board and what conduct of the stockholders warranted such conclusion?

We concede and we repeat that Nones and Tatham had unlimited and paramount authority and power to conduct the ordinary and usual business of the Mining Company in California. They had unlimited power to operate its mining property, buy machinery, make improvements, employ and discharge men, buy supplies, and in short do anything and everything necessary in the operation of its mining property. They had the same authority as the president and general manager preceding them and the same authority that the present president and general manager now have, but the fact that this authority to operate and conduct its ordinary and usual business of mining was and is unlimited, does not mean and cannot be held to mean that Nones and Tatham had authority to engage the Mining Company in *other enterprises* outside of and directly and fundamentally different from its usual and ordinary business, and particularly in enterprises which the Mining Company had no authority to engage under its charter.

We submit that there was no implied authority conferred on Nones by the Mining Company, or by its board of directors, to employ Anderson for any purpose in either enterprise; that there was no acquiescence after knowledge of such employ-

ment; no holding out or negligence on the part of the Company in any respect as to any matter or thing done by Nones, of any authority assumed by him prior to or contemporaneous with the employment of Anderson, such as would warrant Anderson in believing that Nones possessed the requisite authority to employ him for and in behalf of the Mining Company. Nones very frankly testified that these enterprises were conceived by him and he personally employed Anderson and that Anderson understood that his employment was personal and not corporate,—that he fully expected that when he placed the matters before the board of directors that they would ratify his acts. These facts having been proved by defendant in error, we cannot see how a judgment in his favor can be sustained.

RATIFICATION.

(pp. 41-55)

On page 41 attention is directed to two resolutions of stockholders. The resolution of the annual meeting of 1911 is ineffectual for the reason that a quorum was not present,—41,619 shares only being represented against 100,000 shares outstanding.

Both resolutions were *pro forma,* and were adopted as a matter of course, and *without full explanation to the stockholders.* Such resolutions are of no value and under no circumstances could they aid defendant in error.

The following authority is sufficient answer to this contention:

"A general resolution at a stockholders' meeting approving all acts of the directors and officers, such acts not being specified, nor the minutes thereof read to the meeting, is not a ratification of the same. A vote of the stockholders ratifying all the acts of the directors does not ratify acts which are not fully explained to the stockholders."

Cook on Corporations, 6th Ed., Vol. 3, p. 2388, Sec. 730.

"An ultra vires of fraudulent act cannot be ratified by the majority so as to bind the minority; neither can it be ratified by the board of directors."

Cook on Corporations, p. 2412, Sec. 733.

The case of Ballard v. Nye, 138 Cal. 598, is cited and a quotation therefrom appears on page 42. We have no quarrel with the law of this case, nor do we question the correctness of the decision. Judge Lorigan, in deciding that case said:

"*The doctrine of ratification proceeds upon the theory that there was no previous authority,* and that the relation of principal and agent did not in fact exist, but implies it from the acts and conduct of the parties, and when so implied, is equivalent to previous authority * * * The character of proof from which ratification may be inferred * * * is most frequently established by * * * the conduct and acts of the party in whose behalf the unauthorized agency was assumed inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it" (p. 597).

There is nothing in the record in the case at bar which in the slightest way indicates that the Mining

Company intended approving and adopting Nones' action in employing Anderson. There is no evidence of anything done or of any fact known by the Mining Company concerning Anderson's employment, which compelled it to investigate and ascertain the facts. It clearly appears from the record that the Mining Company never knew or heard of Anderson's claim until October, 1913.

In the Ballard case the doctrine of ratification was properly applied, because Mrs. Ballard was informed of sufficient facts concerning the *unauthorized* collection of the insurance money by Hayford to put her on inquiry. She was promptly advised by Mr. Nye that the Insurance Company was ready to pay the money, and she also knew that Hayford had collected the insurance money which was due her, yet she allowed the matter to rest and took no action for nearly three years. Though Hayford had no authority as her agent to collect the insurance money in the first instance, yet her conduct and actions were such after being advised of the facts as to preclude her denial of an implied ratification.

The cases of Sun Printing and Publishing Association v. Moore, 183 U. S. 642, and Oakes v. Water Co., 143 N. Y. 431, arose over matters which were in the line of the company's usual and ordinary business. In neither case did the president attempt anything outside of the Company's usual and regular business, and the language of the court must be construed with this in mind. These cases, therefore, are to be distinguished from the

case at bar, and the language used is to be understood and applied with the limitation which we have noted.

The case of Crowley v. Genessee M. Co., 55 Cal. 273, was correctly decided. The contract in this case was in line of the Company's usual and ordinary business, to wit: a contract to deliver ore at the Company's mill, one-half of the gross returns to be paid to Crowley, the other half to the Mining Company. Crowley was paid for the first mill run, but the Company refused to pay him for the second, *the Company retaining all the money.*

The court properly held that the fact that Quinn was the president and managing agent of the Mining Company was sufficient evidence of his authority to act, as the contract was obviously within the usual and ordinary business of the Company. Crowley performed on his part, and the Company having received and retained all the money, the Supreme Court properly held that the Mining Company was estopped to deny his authority to make the contract. In this case two features stand out and distinguish it from the case at bar:

1st. The contract was for a matter in the line of the Company's usual and ordinary business;

2nd. It received and retained an actual benefit as a result of Crowley's work.

The cases of Case Manufacturing Co. v. Soxman, 138 U. S. 431, and Henderson Bridge Co. v. McGrath, 134 U. S. 260, are not in conflict with our

position, as we have repeatedly conceded that a president and general manager who has full charge of a company's business has authority to bind it in any and all matters in the line of its usual and ordinary business.

The president of a corporation is merely its agent.

The Civil Code of California, Sec. 2319, provides:

> "An agent has authority to do everything necessary or proper and usual *in the ordinary course of business* for effecting the purpose of his agency."

This section of the California Code was literally transplanted from the New York Civil Code. See Sec. 1237.

> "When a contract is made by an agent of a corporation in its behalf and for a purpose authorized by its charter, and a corporation receives the benefit of the contract without an objection, it may be presumed to have authorized or ratified the contract of its agent."
>
> Pittsburgh v. Keokuk Bridge Co., 171 U. S. 371.

This case undoubtedly expresses the true rule applicable to the case at bar:

First: The contract must be for a purpose authorized by its charter;

Second: The corporation must receive the benefit of the contract;

Third: It must receive the benefit without objection.

If these conditions exist then the corporation ought to be bound by the contract of its agent. In the case at bar the purpose of the contract was not authorized by the charter of the Mining Company; the Company did not receive the benefit of the alleged contract without objection—on the contrary it objected strenuously and is still objecting.

In the case of Martin v. Webb, 110 U. S. 7, the language of the court refers to *"a settled course of business"*. If the Mining Company had a well established, settled course of business concerning electric railroads, power plants and water rights, and had permitted its president to engage in same without objection and without interference, then, undoubtedly, the Mining Company would be obligated to pay Anderson for his services. But in the case at bar there is no evidence of any such settled course of business. There is no evidence that the Mining Company had any knowledge of such business and there is no evidence that it ever received any benefit without objection from any source in relation to these unauthorized and hazardous ventures.

In the case of Henderson v. Western Gas Machine Co., 8 Cal. App. 249, *the president was authorized by resolution* of the board of directors to sell certain of its treasury stock. He employed brokers to sell same, and agreed to pay commissions for so doing. In an action by the broker to recover his commissions the court held the company liable as there was proof that it was customary to employ brokers and

pay commissions in such matters. Clearly this case is to be distinguished from the case at bar, as the president was *expressly authorized* by resolution to sell the stock. Employing a broker and paying commissions is merely a necessary incident to the exercise of the express power granted.

The case if *Sperlazzo v. Oliphant,* 24 Cal. App. 84, deals with the powers of the president and general manager of a going concern in matters arising in the usual and ordinary course of business.

We stated in our opening brief (p. 51) that obtaining options on lands for the purpose of controlling the water rights of a particular canyon cannot by any stretch of the imagination be held to be the usual and ordinary business of a mining company, and, on page 62: The purposes of the proposed railroad, to wit: to engage in and conduct a business of carriers for compensation, is so foreign to any purpose authorized by the charter of the Mining Company * * * that * * *

These statements have not been challenged by defendant in error.

We approve of the case of Stokes v. New Jersey Pottery Co., 46 N. J. L. 237, cited on page 49. The court will note that this case qualifies its statement of the law in the first sentence, when it says:

> "When, in the usual course of business of a corporation, an officer has been allowed * * *"

We approve of the doctrine announced in the case of Hackett v. Ottawa, 99 U. S. 86, and Chicago Co. v. Howard, 7 Wall. 392. Corporations as much as individuals are and should be bound to good faith and fair dealing. No more than individuals should they be the victims of fraud or of unfair dealing.

We cited the case of Gribble v. Columbus Brewing Co., 100 Cal. 71, in our opening brief. It expresses the true rule applicable to the case at bar, to wit:

> "When with full knowledge of all the facts involved a principal reaps the fruits of the unauthorized contract of his agent and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped as against one who has fully performed the contract on his part from repudiating it to the injury of the latter."

Three things are necessary: (1) Full knowledge; (2) reaps the fruits of the unauthorized contract; (3) for some time yields acquiescence.

Is there any evidence in the case at bar that the Mining Company reaped the fruits of Anderson's service with full knowledge of the facts? Is there any evidence that *for some time* it yielded acquiescence to his unauthorized employment after knowledge of the facts?

There is no evidence in this case that the Mining Company had full or any knowledge of Anderson's employment until long after his services had been

completed. It never reaped any benefits from his services. On the contrary, it suffered considerable loss by the unauthorized expenditure of its funds in these enterprises. It never at any time yielded acquiescence to Anderson's employment, nor did it ever retain any benefit or advantage therefrom. On the contrary, it is proven that no benefits of any kind resulted from either of these schemes, or from Anderson's services in relation thereto.

The case of Newhall v. Joseph Levy Bag Co., 19 Cal. App. 25, is not applicable. The disputed transaction related to the only business the corporation was engaged in—the buying and selling of bags. Under these conditions the corporation was held estopped to deny the authority of its agent to enter into the contract.

The case of Goodwin v. Central Broadway Building Company, 21 Cal. App. 377, is not in point. The president employed an attorney to defend a suit in which land owned by the corporation was involved. It accepted and retained the benefit of the attorney's services, and the court very properly held that the corporation was estopped to deny the authority of its president to employ the attorney.

The language quoted on page 50 from the case of Bank of Columbia v. Patterson, 7 Cranch 299, to wit:

> "Wherever a corporation is acting within the scope of the legitimate purposes of the institution, all parole contracts made by its authorized agents are express promises of the corporation",

is but another way of expressing the rule in this state, that the agent has authority to do everything necessary or proper or usual in the ordinary course of business for effecting the purpose of his agency.

We perceive no application of the cases cited on page 51, as the principles announced are not questioned and are not relevant.

We direct the court's attention to the language used by Mr. Chief Justice Redfield, quoted on page 52:

> "It is notorious that the transaction of the *ordinary business* of railways, banks and similar corporations in this country, is without any formal meeting or votes of the board."

In the case of Scott v. Oil Co., 144 Cal. 140, the employment of the defendant by the president of the Company was *known to a majority* of the board of directors. The board held meetings in the vicinity and did not repudiate the employment, and the court properly held that the separate consent of a majority of the board was all that ought to be required under the circumstances.

In the case at bar only two out of eleven directors knew of Anderson's employment. If a majority of the directors had known of his employment and had not repudiated it within a reasonable time, so as not to cause him any unnecessary injury, does this court believe that a corporation which has created and disbursed more than $150,000,000 would now be taking up the time of this court in the defense of this action?

At the bottom of page 53 counsel contends that the Mining Company had knowledge of the employment of Anderson because its president had such knowledge, and that whatever was known to the president was necessarily known to the corporation, because it has no eyes, ears or understanding, and that as the president is the head of the corporation it was and is his duty to report all matters coming to his attention to the board of directors. Undoubtedly such a rule would be applicable and the Company bound in all matters coming to the attention of the president relating to its usual and ordinary business. It is not a fixed and arbitrary rule, however. If it was, then every corporation would be bound by every crooked act by a worthless president, just because this worthless president has notice or knowledge of his illegal acts. Such a rule would make conspiracy a profitable business.

The evidence in the case at bar shows conclusively that no report was made by Nones to the corporation concerning Anderson's employment or of the alleged liability of the Mining Company to him. On the contrary, Nones expressly denies any liability on the part of the Mining Company and asserts that he was personally responsible to Anderson in these matters. The law never permits itself to be twisted so as to effect an absurd or iniquitous rule. The law is never permitted to injure the innocent, nor will it ever be permitted to be used as the means of protecting a fraudulent act.

The rule declared in Balfour v. Fresno Canal Co., 123 Cal. 397, has its limitations, and it is so manifestly inapplicable to the case at bar that we leave it without further comment.

The case of Blood v. La Serena Land & Water Co., 134 Cal. 370, is a case showing the proper application of the rule of knowledge by the officers of a corporation. In this case the doctrine of estoppel was applied, and under the facts developed, it was properly held that the corporation was bound by the knowledge of its president and secretary.

Knowledge by the officers of a corporation which is imputed to the corporation itself, is knowledge of legitimate matters in the company's ordinary and usual business. There may be circumstances in connection with the transaction whereby the corporation will be estopped from denying the knowledge of its president and secretary.

While such rules are just and proper, no authority can be found in the books arbitrarily establishing a rule of law to the effect that the knowledge of a president or other officer of a corporation under all circumstances is the knowledge of the corporation.

As we have said, such a rule would permit a scheming and designing president to participate in unlawful profits and bankrupt his corporation.

The true rule is:

> "The corporation has notice of facts which came to the knowledge of its officers or agents while engaged in the business of the corporation,

provided those facts pertain to that branch of the corporate business over which the particular officer or agent had some control."

Cook, Sec. 727, p. 2366;

Zeigler v. Valley Coal Co., 113 N. W. 775 (Mich., 1907).

RATIFICATION.

(pp. 55-58)

The sections of the California Code, cited on page 56, expressly require that the ratification or acceptance be *"with notice thereof"*.

The case of Bien v. Bear River Co., 20 Cal. 613, dealt with a case of ratification of a contract entered into by its president.

On page 614 the court said:

> "The circumstances indicate a different state of facts for it is unreasonable to suppose that the board with Neall at its head confirmed the contract in ignorance of its terms. It can not be said that the contract was not included in the ratification for the 'proceedings' were ratified as well as the report, and the 'proceedings' embraced the contract. It amounted to an express ratification of the contract."

We particularly direct the court's attention to the language of the court found at the top of page 613, to wit:

> "On the question of authority, the plaintiff relies upon the general powers of Neall as president, and upon a ratification by the Board of Trustees, and various acts showing an acceptance of the contract. It is clear that Neall had

> no such authority merely as president, *for his powers in that capacity only extended to matters arising in the ordinary course of the business of the corporation.* Outside of these matters he had no power to bind the corporate body and he was not authorized to make contracts for the purchase of the property, unless required in the usual course of business."

This statement of the law is so clear and concise that nothing that we can say can add to its force. Its application to the case at bar is obvious. It supports our contention.

At the bottom of page 57 counsel repeats that "the essential point is that * * * board * * * in ratifying the acts of the president, possessed full knowledge of what it was doing".

If the court will turn to the minutes of the meeting of the board of directors of the Mining Company of May 1, 1912, quoted in our opening brief on page 19, and carefully read same, it can come to but one conclusion, to wit: that its action at this time related solely to the past actions of its president, to wit: approving the expenditure of $3000 and charging it to March expenses. It is quite clear from the resolution adopted that the action of the board referred and related to expenditures which had been actually made.

From the Company's books it is quite evident that Nones had not accurately presented the matter to the board and that the board was not fully advised of the truth relating to this matter. *$3000 was not* and had not been charged to March ex-

penses, hence it can not be held that the Mining Company is bound by the ill-advised and wrongful action of its board of directors in approving or attempting to approve unauthorized and illegal expenditure of corporate funds; especially should this be so, when it appears that the information upon which the board acted was not accurate and entirely true in all respects.

ULTRA VIRES.

(pp. 58-64)

Defendant in error quotes the opinion of the learned judge of the District Court as an answer to our contention that the enterprises undertaken by Nones were and are ultra vires.

A careful reading of this opinion, relating to this subject, reveals the fallacy of the reasoning which, we respectfully submit, led the learned Justice into error. We direct this court to the language of the opinion, to wit:

> "deliberately entered into by defendant *through its authorized agent,* has been fully performed * * *. It would now be in the highest degree unjust to permit defendant to reap the benefit of whatever advantages may have accrued from the performance of the contract".

If it be conceded that Nones was the "authorized agent" of the Mining Company, then the first premise would undoubtedly be justified. The objection, however, is that though Nones solemnly

and deliberately entered into the contract with Anderson *he was not the "authorized agent" of the Mining Company for such purpose.*

Secondly, it is not enough that the Mining Company reaped benefits of whatever advantages which *"may have accrued"*. Before a corporation can be held liable for acceptance of the benefits, it is incumbent upon the person sustaining the burden of proof to show that *it did* reap the benefits of the advantages which did accrue. *It is not enough that it may have done so.* It must satisfactorily appear that it actually did so; in other words an actual benefit must be proved.

In dealing with this subject the learned Justice further said:

> "I do not feel, however, that the doctrine of ultra vires is necessarily involved."

In supporting this conclusion he reasoned as follows:

> "But plaintiff was employed and he rendered his services not in the organization or the conduct or control of such new corporations and new business, but in the taking of certain preliminary steps," etc.

The vice in this reasoning lies in the fact that *it is contrary to the claims of the defendant in error, set out in his complaint* (Tr. pp. 1 and 2).

Parties are bound by the allegations of their pleadings and are not permitted to controvert their sworn allegations or to adopt a different theory

than the case made by the pleadings. Citation of authority is not necessary to support so elementary a proposition.

For these reasons we most respectfully submit that the opinion of the learned Justice is unsound and is no answer to the argument found in our opening brief (pp. 59-63).

At the bottom of page 59 counsel asks that whether under the Mining Company's charter it could not improve, perfect and market this valuable asset (water). Certainly not. There is nothing in its charter authorizing it to engage in the business of selling water, or for conserving or using its water for the purpose of generating electric power. As we stated in our opening brief, when the charter of the Mining Company was granted, electric power was not known and it was not contemplated that the water powers, which this company then owned, and still owns, could or would be utilized for the purpose of generating electricity to be used for power purposes.

The answer to this question is so clearly stated by Mr. Justice Gray in 131 U. S. 371, that we repeat:

> "The reasons why a corporation is not liable upon a contract ultra vires * * * are * * * *The interests of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the charter and therefore not authorized by the stockholders in subscribing for the stock.*"

If the water rights owned by the Mining Company in the course of time should become valuable

as a water power for the generation of electricity and the corporation desired to take advantage and reap the benefits from its value it would be a simple matter for the stockholders of the Mining Company to so amend its charter as to include the necessary powers so to do. All the stockholders would then be advised of the extent of the powers conferred by its charter and could rest content until fully advised to the contrary that its business operations were confined and limited to the purposes or powers contained in its charter.

The same reasoning applies to the construction of a modern electric road. There is no reason for stretching or distorting the provisions of the Mining Company's charter by judicial construction so as to include this unknown and unheard of purpose when the charter was granted.

The language of the constitution of the State of California, applicable to this situation, is so simple and so clearly expressed that there can be no possible doubt as to its meaning.

> *"No corporation shall engage in any business other than that expressly authorized in its charter or the law under which it may have been or may hereafter be organized."*

Article 12, § 15 of the Constitution of California is as follows:

> *"No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar*

corporations organized under the laws of this state."

Inasmuch as the Constiution is the supreme law of the state, its provisions govern and control this question.

Unless, therefore, the charter of the Mining Company *expressly* authorizes it to engage in the water and railroad enterprises, they are *ultra vires.*

If the Mining Company desires to keep abreast with civilization and to take advantage of modern science, it can easily do so by amending its charter.

On page 60 counsel states that the great fault of our argument is due to the fact that we can not realize that the enterprises undertaken were a part of the business of the Mining Company.

It is utterly inconceivable to us how a power company organized for the purpose of taking over and developing water power and utilizing same for the purpose of generating electricity and selling same for power purposes, or the construction of a modern electric railroad for the carrying of freight, mail and passengers, can be included as a part of the business of an ordinary mining company, *especially one with so narrow and limited a charter as was granted to the Mining Company.*

We offer no apology for not agreeing with the alleged views of the three other lawyers, referred to by counsel, for the reason that it does not appear from the evidence that they were ever called upon to consider this question or that their opinion

was ever requested on it. Even if these gentlemen were of the opinion of the writer on this subject, that fact would not necessarily prevent them in taking the position which counsel alleges they did. If a corporation duly and regularly determines to engage in a business which is concededly *ultra vires,* it does not lie with any individual to question the exercise of that power. The right to do so rested solely with the state.

The argument, however, concerning the opinion of the three other lawyers is based upon inference merely and not upon evidence and is therefore of no weight.

The case of Bates v. Coronado Beach Co., 109 Cal. 160 is not in point for the reason that the court in that case expressly determined,

> "under these circumstances it must be held that the contract was not only within the scope of its organization and essential to the transaction of its ordinary affairs but that it was a prudent step on the part of the appellant for preserving the value of the securities which it had taken upon its sale of the land".

The case of Vandall v. South San Francisco Dock Co., 40 Cal. 83, is not in point for the reason that no question was involved as to the corporation engaging or participating in any unauthorized business.

The Company merely obligated itself to pay the sum of $20,000 for certain benefits conferred by the railroad company, which had a manifest

tendency to improve and enhance the value of its property. It will be noted that the question to be determined in this case related merely to the payment of the money for a purpose which the corporation deemed would be of benefit or advantage to it and that the corporation did not undertake to engage in the business of running or operating a railroad company.

The same is true as to the case of Temple Railway v. Hellman, 103 Cal. 634. The corporation in this case merely paid a sum of money for a right which would increase its business. It did not attempt to engage in the baseball business.

It is quite evident that no satisfactory answer has been made to our contention of *ultra vires.* This being so, the judgment must necessarily be reversed and entered in favor of the Mining Company.

ESTOPPEL TO PLEAD THE DEFENSE OF ULTRA VIRES.

(pp. 64-78.)

This doctrine is relied upon by defendant in error and has been quite elaborately presented.

It presupposes that the action taken by the corporation was and is *ultra vires* but that on account of certain conditions resulting, the corporation is estopped to take advantage of benefits which it accepted or received and then escape its liability or responsibility.

It is expressed by the courts of this State as follows:

> "A corporation having *knowingly received and retained the benefit of contracts* entered into by its directors and officers, even though the contracts were without the specific authority of the defendant, will not be heard to repudiate those contracts, or be permitted to escape the obligations thereof."
>
> Blanck v. Commonwealth Amusement Corporation, 19 Cal. App. Dec. 720.

We concede that estoppels *in pais* operate against corporations the same as against individuals.

If an officer of a corporation, or other person, assuming to have power to bind the corporation by a given contract, enters into the contract for the corporation and the *corporation receives the fruits of the contract and retains them after acquiring knowledge of the circumstances attending the making of the contract,* it will thereby become estopped from afterward rescinding or undoing the contract.

A corporation is in like manner estopped *by retaining with knowledge the fruits of the contract* from pleading *ultra vires* as a defense to an action thereon, that is, from setting up a defense to an action to compel the performance of the contract on its part that it was without power to enter into it.

10 Cyc., 1067-1068.

A Federal decision clearly expresses the reason for the exception:

> "Corporations may be liable to the payment of money on account of contracts which they have entered into ultra vires of their character, and which have been performed by the other party to the contract. The right to relief in such cases rests upon the fact that the defendant *corporation has obtained an advantage which it can not justly retain.*"
>
> 94 Fed. 925.

We have no quarrel with the authorities cited by defendant in error. But we do insist that they are not applicable to this case.

The fallacy of this argument lies in the *unwarranted assumption* of essential facts not established by evidence. We have heretofore directed the court's attention to the failure of proof in these particulars.

Defendant in error asserts that the Mining Company should not now be heard to urge the defense of *ultra vires* for the reason that it has received and retains the benefits of his services. The Mining Company received no benefits, and it does not and did not enjoy the fruits of Anderson's services. The railroad was never authorized and never built. When the new Board of Directors took office both the railroad company and the power company were immediately disincorporated. No benefits of any kind flowed to the Mining Company; on the contrary, it sustained actual loss,—an actual waste of corporate funds.

Anderson's services were wholly worthless and the Mining Company did not receive any benefit therefrom in any shape, manner or form.

The Supreme Court of this State has held that a corporation is not estopped to deny the validity of an unauthorized act of an agent when it has not availed itself of any benefit from his act.

Bliss v. Kaweah Co., 65 Cal. 502;
Thomasson v. Church, 113 Cal. 558.

In the first case cited by defendant in error under this heading,—Argenti v. City of San Francisco, 16 Cal. 255,—the Supreme Court of this State said:

> "* * * the party who has had the benefit of the contract can not be permitted in an action founded upon it, to question its validity."

The court will note that the party who is estopped to question the validity of the contract is the party who has had the benefit, not a party who may have had the benefit, but the party who actually has had the benefit; therefore the burden was on defendant in error in this case to prove by a preponderance of the evidence to the satisfaction of the court that the Mining Company actually had and received the alleged benefits claimed by defendant in error. It is not enough that defendant in error proved that the Mining Company received something; it must prove that it did, in fact, receive a benefit *non constat*. The thing received might have been a liability. Fortunately for plaintiff in error it clearly appears in the case at bar that the alleged benefit thrust upon it was not, in fact, a benefit but, the contrary, was nothing more or less than an actual loss to the Mining Company.

Therefore, the evidence in this case is insufficient to support this doctrine as defendant in error has failed to prove that the Mining Company accepted and enjoyed any benefits as a result of his alleged services. It can not be contended that under such circumstances that the corporation is endeavoring to escape a just liability.

On page 73 the question is asked whether or not the taking over of all the stock was not a receipt of something of value. Two answers suggest themselves to this query.

1st. Whatever stock the Mining Company took over was paid for at its full value without any knowledge of any service performed by defendant in error.

2nd. There is no proof that this stock had any value, nor is there any proof that the stock of the Senonac Power Company had any value.

Not only is there no proof that it had any value, but there is proof in the record that it was utterly worthless and of no value and that the scheme itself was a fizzle and a failure.

The question in this case is not what the stock of the railroad company or the power company *ought* reasonably to be worth, or what its value *ought* to be. It was incumbent upon defendant in error to prove by a preponderance of the evidence that *it was of value* and that the Mining Company did acquire something of value when it took over this stock which we have proved to be worthless.

A great many things cost time and money to secure. The important question is, when secured are they of any value? The theory of estoppel, which counsel contends for, is predicated upon the fact that the corporation should not be permitted to retain something of value and reject a corresponding liability.

On page 74 we believe that counsel has inadvertently included Mr. Burnett as a party representing the Mining Company, upon whose representations Anderson relied. Mr. Burnett was not elected a director until June, 1912, after Anderson's services had been completed.

On the bottom of the same page Tatham's testimony is quoted to the effect that he usually paid bills from this end. Had counsel quoted all his testimony in this regard, it would have appeared from his testimony that he would not have allowed or paid Anderson's claim.

A proposed electric railroad and a large power company, alleged to be the creation of a wealthy mining corporation, naturally awakens public interest in the community and adds to the land values in the vicinity. They create demands and facilitate the sale of the surrounding lands. It is in evidence that during the Nones' administration the Mining Company sold off considerable acreage. Anderson received a commission for these sales.

Both propositions were and are ridiculous, not in any way connected or related with the ordinary

and usual business of the Quicksilver Mining Company.

Therefore, judgment in favor of Anderson for the sum of $7411.00 is against law and is not sustained by the evidence.

We respectfully submit that the judgment should be reversed with instructions to the court below to order judgment in favor of the Mining Company.

Dated, San Francisco,
June 20, 1917.

Respectfully submitted,
A. H. JARMAN,
Attorney for Plaintiff in Error.